

No. 77-1809

Supreme Court, U. S.  
**FILED**

AUG 28 1978

MICHAEL ROSAK, JR., CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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**SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,  
PETITIONER**

**v.**

**NATIONAL MEDIATION BOARD, ET AL.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT**

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**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A-8 to A-19) is reported at 574 F. 2d 394. The opinion of the district court (Pet. App. A-1 to A-6) is not reported.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. A-20 to A-21) was entered on March 29, 1978. The petition for a writ of certiorari was filed on June 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the National Mediation Board fulfilled its statutory duty to investigate the representation dispute among petitioner's employees.

2. Whether the Due Process Clause requires the National Mediation Board to hold a hearing for the purpose of determining the eligibility of individual employees to vote in representation elections.

#### STATUTE INVOLVED

Section 2, Ninth of the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 152, Ninth provides:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons

who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

#### STATEMENT

In March 1976 the National Mediation Board conducted a mail ballot election to resolve a representation dispute that had arisen among petitioner's pilot and co-pilot employees.<sup>1</sup> Prior to holding the election, the Board conducted an investigation and determined that 59 of petitioner's employees were eligible to participate in the balloting. At the election, 30 of these employees cast votes in favor of representation by the respondent union, and the union thus received the majority needed for certification (Pet. App. A-34 to A-38).

Petitioner filed an application with the Board to vacate the certification of the union. Petitioner contended that four employees had been wrongly disqualified from voting at the representation election while one ineligible employee (Shaw) had been permitted to vote (Pet. 4; R. 40-43).<sup>2</sup> On May 7, 1976, the Board informed petitioner that the Board had reexamined the voting qualifications of the employees and concluded that, while the four employees had been correctly excluded from the voting

<sup>1</sup>The ballot used by the Board was identical in form to that approved in *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 656, 657, 668-671.

<sup>2</sup>"R." refers to the record filed in the court of appeals.

unit, the Board had erred in qualifying Shaw to vote. The Board observed that the error was immaterial to the outcome of the election, however, because Shaw had not voted for the union and the union thus retained a majority of the qualified votes (R. 47; see Pet. App. A-10 n. 2).

Petitioner then instituted this suit in the United States District Court for the Southern District of Iowa. It sought to have the Board's certification of the union set aside and a new election ordered. Petitioner contended that the Board had failed to comply with its duty under Section 2, Ninth of the Railway Labor Act "to investigate" the employee representation dispute. 45 U.S.C. 152, Ninth. Petitioner also argued that the Board's failure to hold an evidentiary hearing on petitioner's assertion that four employees were improperly excluded from the representation election violated the Due Process Clause of the Fifth Amendment.

The district court granted the Board's motion for summary judgment (Pet. App. A-1 to A-6). The court observed (*id.* at A-5) that this Court has held that, in enacting Section 2, Ninth of the Act, "Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case." *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 662 (hereinafter *Railway Clerks*). The district court held that, under the decision in *Railway Clerks*, the Board had fulfilled its statutory responsibility "to investigate" the employee representation dispute in this case by (1) assigning a mediator to solicit and gather information concerning the work assignments and duties of petitioner's employees; (2) designating the eligible employee electorate; (3) conducting an employee-representation election; and (4) considering and acting on petitioner's post-election

arguments concerning the voting eligibility of particular employees (Pet. App. A-5 to A-6). With regard to petitioner's contention that the Board's refusal to hold a hearing on the eligibility dispute violated the Due Process Clause, the district court held that decisions on eligibility are committed to the discretion of the Board and are not subject to judicial review, and that petitioner therefore has no procedural right to participate in the Board's investigations (Pet. App. A-6).

The court of appeals affirmed. The court observed that, under *Railway Clerks, supra*, 380 U.S. at 662, the Board must conduct "such investigation as the nature of the case requires," but that the investigation is "not required to take any particular form" (Pet. App. A-14). The court concluded that the enquiry by the Board in this case fulfilled its statutory duty "to 'investigate' the dispute and to designate who might participate in the election" (Pet. App. A-15).

The court of appeals also rejected petitioner's due process arguments. The court noted that in *Railway Clerks, supra*, this Court rejected the claim that "due process requires that [the employer] be accorded an opportunity to participate in the proceedings by which the Board determines which employees may participate." 380 U.S. at 660; see *id.* at 666-667. The court of appeals stated that petitioner's objections had, in any event, been received and acted on by the Board, and that the Constitution does not require the Board to "further consult" with petitioner in the representation investigation (Pet. App. A-18 to A-19).

#### ARGUMENT

The decision of the court of appeals applies settled principles to the particular facts of this case. There is no conflict among the circuits and thus no reason for further review.

1. Petitioner contends (Pet. 7-12) that the Board failed to conduct an investigation adequate to fulfill its duties under Section 2, Ninth of the Railway Labor Act. Petitioner does not dispute that the decision on employee eligibility is a matter that ultimately rests in the discretion of the Board, and that "the Board's action \* \* \* is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the [representation] dispute." *Railway Clerks, supra*, 380 U.S. at 661.<sup>3</sup> Petitioner maintains, however, that the Board's enquiry into the dispute in this case was not an "investigation" of the kind required by the Act (Pet. 10).

As the court of appeals pointed out (Pet. App. A-14), although the Railway Labor Act requires the Board to "investigate" the representation dispute, "[t]his command is broad and sweeping." *Railway Clerks, supra*, 380 U.S. at 662. The Act does not require any particular kind of investigation in every case. Instead,

the Board's duty to investigate is a duty to make such investigation as the nature of the case requires. An investigation is "essentially informal, not adversary"; it is "not required to take any particular form." \* \* \*

These principles are particularly apt here where

<sup>3</sup>See also *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303; *General Committee v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323, 336; *Aeronautical Radio, Inc. v. National Mediation Board*, 380 F. 2d 624 (C.A. D.C.), certiorari denied, 389 U.S. 912; *Decker v. Venezolana*, 258 F. 2d 153 (C.A. D.C.); *Ruby v. American Airlines, Inc.*, 323 F. 2d 248 (C.A. 2), certiorari denied, 376 U.S. 913; *UNA Chapter, Flight Engineers' International Association v. National Mediation Board*, 294 F. 2d 905 (C.A. D.C.), certiorari denied, 368 U.S. 956; *WES Chapter, Flight Engineers' International Association v. National Mediation Board*, 314 F. 2d 234 (C.A. D.C.); *Pan American World Airways v. International Brotherhood of Teamsters*, 275 F. Supp. 986 (S.D. N.Y.), affirmed *sub nom. Brotherhood of Railway, Airline and Steamship Clerks v. Pan American World Airways*, 404 F. 2d 938 (C.A. 2).

Congress has simply told the Board to investigate and has left to it the task of selecting the methods and procedures which it should employ in each case. [*Railway Clerks, supra*, 380 U.S. at 662.]

The purpose of the investigation is to protect the right of the "majority of any craft or class of employees \* \* \* to determine who shall be the representative of the craft or class for the purposes of this chapter." Section 2, Fourth, 45 U.S.C. 152, Fourth. In the course of its investigation into the employees' representation dispute, the Board is to employ "a secret ballot" or "any other appropriate method of ascertaining the names of [the employees'] duly designated and authorized representatives \* \* \*." Section 2, Ninth. In conducting such an election, the Board is to ensure that "the choice of representatives by the employees [is made] without interference, influence or coercion exercised by the [employer]" (*ibid.*). The Act further provides that "the Board shall designate who may participate in the election \* \* \* or may appoint a committee of three neutral persons who after hearing shall within ten days designate the [eligible] employees \* \* \*" (*ibid.*). Although the Act thus provides broad guidance to the Board concerning the objectives and nature of the investigation to be made, Congress left the Board free to determine "the methods and procedures which it should employ in each case." *Railway Clerks, supra*, 380 U.S. at 662.

The district court properly concluded, on the facts of this case, that "[c]learly, an 'investigation' of the dispute, sufficient to preclude the finding of a gross statutory violation or of an ignorance of an express command of the Act, was undertaken" (Pet. App. A-5):

Here, the Board assigned mediator Edward F. Hampton to commence investigation of the SMB case. Hampton requested and obtained from plaintiff's executive vice-president, Robert Grammer,

lists of employees within the designated class of pilots and co-pilots, discussed with Grammer the eligibility status of certain employees, and solicited information concerning certain employees work assignments and duties. An election was then held, the result ascertained, and the Board authorized a bargaining representative.

The court of appeals agreed that, on this record, "we cannot say \* \* \* that the Board acted in excess of its powers or contrary to a statutory provision" (Pet. App. A-15). The court stated that the Board's letter to petitioner's counsel denying the request to vacate the union's certification is persuasive evidence "that the Board had not failed to give consideration" to the voting qualifications of the employees in the representation dispute (*ibid.*). The court of appeals held that petitioner's claim "does not go beyond asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory \* \* \* authority" (*id.* at A-17, quoting *WES Chapter, Flight Engineers' International Association v. National Mediation Board*, 314 F. 2d 234, 237 (C.A. D.C.)). The court of appeals thus correctly concluded that, under settled principles, petitioner's claim must be rejected. There is no reason for further review of the largely factual determination made by the court of appeals and the district court in this case.

Petitioner asserts (Pet. 12-14) that the decision in this case conflicts with the Ninth Circuit's decision in *International In-Flight Catering Co. v. National Mediation Board*, 555 F. 2d 712 (C.A. 9). *In-Flight* held that, on the facts of that particular case, the Board had failed to "perform its statutory duty to 'investigate' the [representation] dispute." 555 F. 2d at 718, quoting *Railway Clerks, supra*, 380 U.S. at 661. The decision in *In-Flight* does not conflict with the decision in the present

case, however, for the simple reason that the facts in the two cases are different. In *In-Flight* the Board's "investigation" of the representation dispute had been limited to determining whether the signatures on the employees' "Request for Election Cards" were valid. The Board simply assumed in that case that the "Request for Election Cards" were in fact the employees' votes for union representative. 555 F. 2d at 718. On these facts, the court found in *In-Flight* that the Board had not conducted an election or otherwise determined whether the employees had intended to select the union as their representative, and thus had not conducted an investigation of the dispute.

By contrast, as the decisions of the district court and the court of appeals reveal, the Board conducted an employees' election in this case as part of a thorough investigatory enquiry. The election had been preceded by a field investigation conducted by the Board's mediator and, following the election, the Board had reconsidered and revised its decision as to the eligibility of particular employees to participate in the election. The Board's procedures here were much more thorough than the procedures disapproved in *In-Flight*.

2. Petitioner contends (Pet. 16) that the Board denied it "the minimal procedural due process guarantees of notice and the opportunity to be heard during the Agency's representation proceedings." The court of appeals (Pet. App. A-17 to A-18) properly rejected petitioner's argument.

Congress intended that the employer would be excluded from all Board proceedings to prevent interference with the employees' organizational efforts.<sup>4</sup> Thus, under the

<sup>4</sup>Section 2, Fourth of the Railway Labor Act, 45 U.S.C. 152, Fourth, provides that employee-collective organization and bargaining efforts are to be free from the employer's attempt "to

Act. "[w]hile the Mediation Board is given specified powers in the conduct of elections, there is no [statutory] requirement as to hearings." *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 304; see also *Railway Clerks, supra*, 380 U.S. at 667. Moreover, in *Railway Clerks* this Court explicitly rejected the contention that a carrier has a constitutional right to a hearing in connection with the Board's investigation of a representation dispute.

[W]hile the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, we cannot say that the latter's interest rises to that status which requires the full panoply of procedural protections.

\* \* \* \* \*

Nor does the Act require that [the employer] be made a party to whatever procedure the Board uses to define the scope of the electorate. \* \* \* Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board. [380 U.S. at 666-667.]

influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." Section 2, Ninth provides that "the [Board] shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such [a] manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." (Emphasis added). The legislative history of the Act indicates Congress' concern that the employer be removed from the employee representation process to prevent interference with organizational efforts. See Hearings on H.R. 9861 before the House Committee on Rules, 73d Cong., 2d Sess. 10-11 (1945); *Pan American World Airways v. International Brotherhood of Teamsters*, 275 F. Supp. 986, 998 (S.D. N.Y.).

There is nothing to warrant any different conclusion in this case.

Petitioner contends (Pet. 16-17) that, although it may not be entitled to a "full panoply of procedural protections," *Railway Clerks, supra*, 380 U.S. at 666, it is nonetheless entitled to the "minimal procedural due process guarantees of notice and the opportunity to be heard \* \* \*." Even if this contention were correct,<sup>5</sup> it is apparent that petitioner was notified of the Board's actions and *did* receive an opportunity to contest the eligibility determinations by filing a written challenge to the certification order.<sup>6</sup> As the court of appeals held, "[i]t is clear that the Board did consider some of [petitioner's] proffered evidence in this case subsequent to the election, and in fact reversed its eligibility decision as to [one of the employees]" (Pet. App. A-18). There is no statutory or constitutional requirement that the Board "further consult" (*id.* at A-19) with petitioner in designating the employee electorate.

<sup>5</sup>Petitioner's argument under the Due Process Clause is defective because the Board's investigation of the employees' representation dispute does not implicate any property or liberty interest of the employer. As this Court held in *Railway Clerks, supra*, 380 U.S. at 666, "it is the employees' representative that is to be chosen, not the carriers." In the absence of a liberty or property interest, the procedural protections of the Due Process Clause are not implicated. *Meachum v. Fano*, 427 U.S. 215.

<sup>6</sup>The fact that petitioner was not notified of the Board's eligibility determinations until after the election was held is not important. Even assuming that petitioner is entitled to be heard on the Board's eligibility decisions, the opportunity for subsequent challenge to the validity of the election provided sufficient protection for the interest that petitioner claims to possess in the Board's investigation. *Mathews v. Eldridge*, 424 U.S. 319; *Dixon v. Love*, 431 U.S. 105. Petitioner's interests are not affected until the certification process is complete and all challenges have been resolved. There is no "temporary" or "interim" deprivation that could occasion any need for prior notification. Cf. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339.

This Court frequently has held that the requirements of the Due Process Clause are flexible. They may be satisfied by informal procedures involving little more than personal discussion. See, e.g., *Memphis Light Gas & Water Division v. Craft*, No. 76-39, decided May 1, 1978; *Board of Curators of the University of Missouri v. Horowitz*, No. 76-695, decided March 1, 1978. The procedures may be conducted on the written record in whole or in part. *Mathews v. Eldridge*, 424 U.S. 319; *Richardson v. Perales*, 402 U.S. 389. Here written proceedings were supplemented by a mediator's personal investigation. Petitioner does not point to any evidence it could have introduced only in oral proceedings, and it does not demonstrate that eligibility disputes are unsuited to resolution on written submissions, or that written submissions create an unacceptable risk of error. Petitioner consequently has not offered an adequate reason for the Court to reexamine its decision in *Railway Clerks*.

Congress intended the Board's procedures to be informal. Petitioner seeks to upset that congressional choice, but there is no adequate reason to do so, and its arguments in this regard should be addressed to Congress. *Ruby v. American Airlines, Inc.*, 323 F. 2d 248, 256 (C.A. 2), certiorari denied, 376 U.S. 913. The Board did not abuse the discretion afforded to it under the Act by investigating the employer's objections to the election on the basis of the employer's written submission rather than on the basis of a full adversary hearing. See *Railway Clerks*, *supra*, 380 U.S. at 667.

# CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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AUGUST 1978.